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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

Nos. 780 and 781

WILLIAM J. DRURY,

Petitioner,

vs.

STEPHEN E. HURLEY, JOHN W. CLARK and ALBERT E. WILLIAMS, Civil Service Commissioners of the City of Chicago.

and

THOMAS E. CONNELLY,

Petitioner,

vs.

STEPHEN E. HURLEY, JOHN W. CLARK and ALBERT E. WILLIAMS, Civil Service Commissioners of the City of Chicago.

REPLY BRIEF OF PETITIONERS (on Petition for Certiorari).

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May it Please the Court:

We reply to the points made by respondents in the order in which they appear in their Brief in Opposition:

I.

A "construction of the constitution" must be involved in a case in order to support a direct appeal to the Supreme Court of Illinois. All other constitutional questions go to the Appellate Court.

Opposing counsel have argued that the Supreme Court of Illinois decided that there was no constitutional questions upon this record, but such contention is untenable for the reason that the Supreme Court has only a limited jurisdiction of constitutional questions on direct appeal,—where a "construction of the constitution" is involved, only.

This cause was transferred by the Supreme Court of Illinois to the Appellate Court of that State,—not because there was no constitutional question on the record—but because, as said by the Supreme Court of Illinois, the particular constitutional question raised was not one in which a "*construction of the constitution* is involved" as provided in the Civil Practice Act of Illinois.

Viewpoint on direct appeals reversed.

The decision is a tacit reversal of the viewpoint, formerly entertained that all constitutional questions went directly to the Supreme Court on appeal, and that the Appellate Court had no jurisdiction to consider any constitutional question.

As pointed out in the opinion of the Illinois Supreme Court its jurisdiction on direct appeal depends upon whether there is in the record a "*fairly debatable constitutional question of the character mentioned in the Civil Practice Act*" preserved in the record.

These cases were therefore transferred to the Appellate Court of Illinois to consider the constitutional questions, as well as others, upon the record. But the Appellate Court ignored the constitutional questions raised and argued, so got no decision on their constitutional questions.

Construction presumes ambiguity or uncertainty.

Cases have arisen in other jurisdictions where the phrase "construction of the constitution" is used to designate where an appeal should be taken whether to an Appellate or Supreme Court and it is held that the phrase in its context imparts some ambiguity or uncertainty as to meaning; and so it was held that "when the language is plain there can be no construction, because there is nothing to construe" (*Terre Haute R. Co.* v. *Erdel,* 158 Ind. 344; *Turner* v. *State,* 185 Ga. 432). Negative and prohibitive clauses of the Fourteenth Amendment need no construction (16 C. J. S., p. 103, Sec. 50). "Where the intention is clear there is no reason for construction" of constitutional provisions (*U. S.* v. *Sprague,* 282 U. S. 716.)

The Supreme Court of Illinois has finally in its opinion in these cases, put itself right on its jurisdiction in direct appeals in constitutional questions. It points out that it has no jurisdiction on direct appeal *unless there is involved a construction of the constitution,*—a fairly debatable construction, as contemplated in the Civil Practice Act of Illinois. Heretofore it has been considered that all appeals in constitutional cases go direct to the Supreme Court, and the Appellate Court has always refused to consider any type of constitutional question and has consistently held all consitutional question as waived by appeal to the Appellate Court. For instance in the case of *People* v. *White,* 329 Ill. App. 81 that Court said:

> "Since neither of these appeals was prosecuted to the Supreme Court, *which has exclusive jurisdiction to determine constitution questions* * * *," (Italics ours.)

So there being *no construction* of the constitution sought, —but only its *applicability and enforcement,* the Supreme Court of Illinois had only jurisdiction to order the cases transferred to the Appellate Court under the applicable statute providing for transfer of cases erroneously appealed.

The Appellate Court takes all constitutional cases except cases involving construction.

So the statement should now be phrased differently, and be made to state, that appeals involving all constitutional questions go to the Appellate Court of Illinois, except those involving a fairly debatable issue of *"construction of the consttiution"*.

Opposing counsel say the "Appellate Court did not consider any constitutional question," (p. 15), which means that the Appellate Court did not pass upon the constitutional questions on the record because it either ignored those questions, or, it erroneously conceived it had no jurisdiction to pass upon any constitutional question. If the latter its error in that regard is now exposed under the decision of the Illinois Supreme Court in this case.

If the Appellate Court ignored the constitutional questions it left the decision thereof for this court.

The patent fact is, whether or not considered by the Illinois Courts, the constitutional questions presented here were argued at every turn of the case,—before the Civil Service Commission, before the Supreme Court of Illinois, the llinois Appellate Court, again on petition for leave to apepal, and now, here. They have never been soft pedaled, abandoned, nor waived.

In any event the federal questions raised should have been passed upon, and the failure to do so denied due process of law.

II.

The judgment of the Supreme Court of Illinois transferring the two appeals to the Appellate Court for decision was obviously interlocutory.

Opposing counsel contend that *all* constitutional questions were waived by petitioners because they did not ask for certiorari here from the judgment of the Supreme

Court of Illinois transferring the cases to the Appellate Court of Illinois, but we point out that there are three answers to that contention—(A) the order was interlocutory; (B) the type of the constitutional questions raised were not such as allow direct appeal to the Supreme Court; (C) the ultimate decision of such question is for this court, which we discuss in order.

A.

An order transferring a cause to another court for decision because of a procedural error, and lack of jurisdiction, obviously is not final,—no more than a change of venue would be. Where the court has no jurisdiction it can only order the cause tranferred.

B.

The Supreme Court of Illinois pointed out in its opinion that no construction of a constitutional prvision was made by the trial court, and none were raised on the record, and that that was the only type of constitutional question that would support a direct appeal to the Supereme Court of Illinois.

C.

This Court is not bound by decisions of state courts as to whether a federal constitutional question is raised by the record nor by the disposition made of such contentions in the State courts. Federal questions are tried as of course in State courts, and records made, the same as upon other issues, but this court ultimately judges whether such federal questions are correctly disposed of, procedurally or substantively.

We respecfully suggest that where, by procedural movements a constitutional question is sidetracked, and not passed upon, a party relying upon such constitutional question is effectively denied a hearing and thereby denied due process of law.

III.

The standard of conduct of a police official is not so high, or duties so exacting, that he may not defend himself against official tyranny.

Opposing counsel say that it was properly held that the refusal of petitioners to sign an immunity waiver before the Grand Jury "concerning matters arising out of and during the course of their employment was cause for their removal." The statement, by its assumptions, is incorrect. The matters did not arise out of and during the course of their employment in the sense contended. The matters referred to reflect a staged proceeding by a hostile State's Attorney and his effort to crush and destroy petitioners as police officers by a Grand Jury hearing and an indictment, —sought obviously as a basis for the discharge of petitioners upon a manufactured "cause".

Opposing counsel do not mention in their argument, nor seek to excuse, the admittedly tyranous conduct of the State's Attorney toward petitioners as an element of the case; whereas we contend that it makes the exception to the rule, if there be a correlative rule.

The viewpoint of respondents is stated in their Brief in Opposition at page 24 thereof as follows:

> "We do not question that the petitioners have the constitutional right to refuse to sign an immunity waiver. We contend that in refusing to do so, under the circumstances of this case, [they do not states the circumstances], they acted in violation of their duties, failed to measure up to the high standards of character and moral conduct incumbent upon trusted police officers and were therefore guilty of conduct unbecoming police officers and subject to removal under Section 12 of the City Civil Service Act."

The standard set for conduct under such circumstances as here shown is too high for any calling. Self preservation is the law naturally obeyed. Petitioners were not supposed in law to turn the other cheek nor put themselves in position to be kicked.

Oposing counsel do not mention the staging of the Grand Jury hearing by the aggresively hostile State's Attorney, and the admitted innocence of petitioners as circumstances; nor the personal activity of the State's Attorney in taking a nolle prosse of the indictment against the alleged assassins; his subsequent apearance before the Grand Jury on the same day after it had voted a "no bill" as to his charges against petitioners; the resulting indictment of petitioners upon the perjured testimony of the recanting witnesses, and the personal interest taken in the prosecution of petitioners before the Civil Service Board.

We include those elements in our question and ask whether under those circumstances a refusal by petitioners to sign an immunity waiver is unbecoming conduct.

We challenge the view point that a refusal to sign an immunity waiver for a State's Attorney, who is making the matter a personal isue, could be made a cause for discharge from a Civil Service position, even if there were a law, or rule, establishing such refusal as a cause; and suggest that, even supposing such a rule to exist, the circumstances here, admittedly existing, would be an excusing exception.

Petitioners were called to testify against themselves.

Petitioners were brought before the Grand Jury to testify against themselves,—not against any one else; and they were asked to sign immunity waivers so that what they might say could be used against them elsewhere.

The situation was no different in principle than if they had been indicted, and, on trial, the State's Attorney had called them to the stand to testify for the State as witnesses against themselves

No one, we asume, would contend that it would be conduct unbecoming a police officer to refuse to be a witness against himself if he were called by the State's Attorney to testify as a witness for the State in a prosecution under an indictment against himself;—for he is not then in character; neither is he in character when he resists a public prosecutor who is personally staging an effort to destroy him by a pretrial examination, and the process of indictment. It is then his personal, not his official concern. There can be no difference in principle, for the State's Attorney here was seeking statements to use against petitioners as original testimony in a trial under an anticipated indictment. If he was not, then he was trying to publicly disgrace them and secure their discharge. On either theory petitioners, were justified in seeking their own preservation.

IV.

Delegation to the Civil Service Commission of the power to determine what shall be cause for dismissal, only delegates power to make a rule fixing what shall be cause. Fixing a cause by order or judgment on complaint is legislation, and in this instance its legislation is by class and denies equal protection of the law.

We do not contend, as opposing counsel suggests, that the judgments of the Appellate and Supreme Court of Illinois is the source of the class legislation complained of; what we say is that where the Civil Service Commission does not by rule, which is legislation, establish what is cause for discharge, it is, by its judgments legislating from day to day, and case to case, certain conduct to be cause for discharge; because such judgments may not be the same one day as the next; which is progressively legislating to suit the occasion and doing so ex post facto. It is legislating without a standard to go by.

The legislature of Illinois has delegated to the City Civil Service Commission the power to determine "cause" for

discharge of an employe by the restrictive phrase that no officer or employee should "be removed or discharged except for cause." Necessarily the Commission legislates every time it discharges some one for some conduct not specified as cause in the law or rules. By its order it makes the law of the case. Its orders are legislative in nature.

Ex Post Facto Judgments.

Law was enacted by the Civil Service Commission by its judgments in this case,—made after the fact. Its legislation should have been made by rule before the fact,—before service in the position was commenced; or, at least, before the fact complained of,—for the right of immunity from being a witness against oneself is a privilege and a right; legal and necessarily moral. It should have been proclaimed by rule, if it were to be urged that waiver of the constitutional privilege was inherent in the obligations of a police officer.

Power to legislate usurped by the Civil Service Commission.

In any case the claim of constitutional immunity from being made a witness against oneself becomes a natural and inherent right under our basic law, and if the exercise of such right is to be made a "cause" for discharge of a policeman from a Civil Service position, the legislation to that effect should be first made so that assumption of the office waives the right in advance. Which illustrates the contention that making a claim of immunity from being made a witness against oneself, as a "cause" for removal of a policeman, is essentially legislative in character.

The legislature has fixed no standard.

The establishment of such a doctrine belongs to the legislature and not to the Civil Service Commission. By such orders the Civil Service Commission usurps the functions

of the legislature. No such law exists in Illinois and the Civil Service Commission has no power to make such law,—it only usurps such power.

We respectfully suggest that the obvious malice in which this case originated and the usurpation of legislative power by the Civil Service Commission; the refusal of the Illinois courts of appeal to consider constitutional questions upon the record; the effect of such procedure and decisions upon the fortunes of petitioners, and of others similarly situated, is such that it violates the spirit of the Fourteenth Amendment and denies to petitioners equal protection of the laws and due process of law.

Due process is more than a slogan, it is fair play.

Of what possible good to a defendant is a law suit if the court refuses to hear his contentions. The physical characteristics of a law suit may be there as when the characters are going through the pantomine but the spirit of due process is missing and the substance of due process is denied.

Due Process is denied when constitutional rights are ignored and federal questions are officiously brushed aside by State tribunals.

The principle of the cited cases have been argued.

The cases cited by opposing counsel are of course interesting and educational but they do not decide the point at issue in this case and we refrain from otherwise commenting upon them here as our original brief contains an applicable discussion.

The question persists.

The question remains whether *under any circumstances* a policeman may claim the constitutional exemption from being a witness against himself. The Appellate Court of Illinois says there is none; while the Supreme Court of Illinois and the Court of Appeals of New York say a lawyer similarly situated may claim the privilege without showing any moral unfitness. Both, we assert, and all, should be equally protected, as the Fourteenth Amendment guarantees.

Conclusion.

Wherefore it is respectfully suggested that the arguments here made and authorities cited show that an important and unsettled question of law is upon this record and that the Court should take the case on certiorari for decision.

Respectfully submitted,

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